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CITATIONS

709320—46

In the Supreme Court of the United States

OCTOBER TERM, 1946

No. 298

J. A. BYERLY, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

The memorandum opinion of the Tax Court of the United States (R. 89–93) has not been reported. The opinion of the Circuit Court of Appeals (R. 116–118) is reported at 154 F. 2d 879.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on April 17, 1946. (R. 115.) Petition for a writ of certiorari was filed on July 15, 1946. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether the Tax Court erred in concluding from the evidence that a trust established by the taxpayer is not sufficiently substantial to warrant taxation of the income from the property to the trust rather than to the taxpayer.

STATUTES INVOLVED

Revenue Act of 1936, c. 690, 49 Stat. 1648:

> SEC. 22. GROSS INCOME.
>
> (a) *General Definition.*—"Gross income" includes gains, profits, and income derived from salaries, wages, or compensation for personal service, of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever. * * *

Section 22 (a) of the Revenue Act of 1938, c. 289, 52 Stat. 447, and Section 22 (a) of the Internal Revenue Code (26 U. S. C. 1940 ed., Sec. 22) contain provisions identical with those of the Revenue Act of 1936 above quoted.

STATEMENT

This case involves deficiencies in income tax for the taxable years 1937, 1938, 1939 and 1941,

assessed by the Commissioner of Internal Revenue against the taxpayer, J. A. Byerly, and taxing to him the income of property which he had transferred to a trust. The taxpayer is president of the J. A. Byerly Company, a corporation organized in 1924 to take over his established business. The corporation operates 41 retail food stores. Prior to December 31, 1935, the taxpayer held 16,990 of the 19,250 shares outstanding, the remaining shares being held, until 1939, by employees of the corporation. (R. 82.)

Under date of December 31, 1935, the taxpayer executed a trust indenture by which he transferred 8,100 shares to Mae Ward Byerly, his wife, and Jens M. Beck and Carl O. Uhlman, as trustees (R. 82). The trust instrument (R. 82–86) recited that the taxpayer had accumulated a sizable estate in his own right, by diligent effort and prudent business methods pursued by him throughout the past 35 years or more; that he wished to acknowledge his debt to his family and to assist his sons financially, but deemed it inadvisable to make substantial gifts to inexperienced young men unless control was safeguarded and directed by persons of more mature experience and judgment (R. 82–83).

The beneficiaries of the trust were the taxpayer's wife, Mae Ward Byerly, and his two sons (R. 85), the older of whom reached his majority on November 27, 1941 (R. 82). The trustees were directed to pay the net income in equal

shares to each of the beneficiaries during his lifetime, unless the trustees should deem it advisable to accumulate the income (R. 84). On the death of a beneficiary the remaining beneficiaries were to take his interest, except that if a beneficiary died leaving issue, the issue would take the parent's share *per stirpes.* If all of the beneficiaries died leaving no issue, the trust was to terminate and the trust property was to be distributed to the grantor, if living, or to his heirs. (R. 86.) The trust was to endure for the lifetime of the last surviving named beneficiary, and until the youngest of his issue should reach 21 years of age (R. 86), unless sooner terminated in the discretion of the trustees with the written consent of the beneficiaries, in which event the property was to be transferred to the grantor (R. 85).

The trustees were authorized to sell, assign or transfer any part of the trust property and to deal with it for the benefit of the trust, and to appoint successor trustees (R. 84–85).

The Tax Court found that the trustee J. M. Beck is a director, vice-president and merchandise manager of the corporation; that the taxpayer as president could remove Beck from his position at any time; and that Beck, whose salary increased from $5,000 in 1937 to $12,000, has handled no investments other than those of the trust, except his own (R. 87). The trustee Uhlman was secretary of the corporation; on his death in 1940, George Carruthers was appointed

trustee at Beck's suggestion and with Mrs. Byerly's acquiescence, because of his acquaintance with the food business. Carruthers was not an employee of the corporation but was consulting accountant for the corporation, for the trust and for Byerly individually and prepared their income tax returns. (R. 87.) None of the trustees has ever received any compensation for services as trustee. The meetings of the trustees were informal at odd times; no minutes were kept. As a rule, matters were discussed by Beck and Carruthers at odd times during business hours, Mrs. Byerly being later informed, sometimes by telephone, and acquiescing in their plans. (R. 87.) Beck stated that there were not many decisions to be made and they were rather ordinary (R. 52, 87).

In 1936 the trust acquired 4,639 additional corporate shares from the taxpayer. In 1939 the trust acquired the 2,260 shares held by employees of the company. During 1941 the trust acquired 6,000 additional shares from the corporation, and distributed 4,000 shares equally to the beneficiaries. The trust thereafter held 16,999 shares of the 25,250 outstanding. (R. 87–88.)

The Commissioner of Internal Revenue determined deficiencies in income tax of J. A. Byerly for 1937, 1938, 1939 and 1941 on the ground that (R. 15, 30)—

> By reason of the close family relationship and your choice of trustees, together

> with other rights retained, it appears that you could dominate and control the property and income of the trust during all the years here involved.

The Tax Court sustained his determination.[1] (R. 89–91.) The Circuit Court of Appeals affirmed. (R. 115.)

ARGUMENT

The trust here involved is a trust of shares of stock of a corporation which constituted the taxpayer's business property, accumulated by the taxpayer "by diligent effort and prudent business methods, pursued by him throughout the past thirty-five years or more" (R. 19), the trust being so arranged as to allocate the income within the taxpayer's family group—to his wife and two children who were minors during practically all of the period in question (R. 90). Not ignoring the taxpayer's relinquishment of trust control by the express provisions of the trust instrument, the Tax Court concluded from circumstances outside

[1] Under the same opinion (R. 82–93) the Tax Court, affirmed by the Circuit Court of Appeals (R. 115–118), expunged deficiencies which the Commissioner asserted against the trustees of the J. A. Byerly trust in order to protect the revenues in the event that the deficiencies here asserted against the grantor should not be sustained. Those deficiencies are involved in *Commissioner* v. *J. M. Beck, Mae Ward Byerly and George Caruthers, Trustees, J. A. Byerly Trust*, in which the Commissioner is filing a petition for certiorari in order to prevent the Tax Court's decision becoming final pending the outcome of this case.

the instrument, and the Circuit Court of Appeals affirmed that the taxpayer, notwithstanding the existence of the trust, was still in substantial control of the shares and income; that he still controlled the business and assured the support and maintenance of his family through its income; and that the trust was not sufficiently substantial, under the doctrine of *Helvering* v. *Clifford,* 309 U. S. 331, to warrant taxing the income to the trust rather than to him. (R. 89–91). The findings which gave rise to these conclusions went to the mode of selecting the trustees—selected because they were employees of the corporation which the taxpayer had set up and controlled; that they were at least tractable to the taxpayer's authority as president of the corporation; and that the trustees in fact exercised no discretion independently of the taxpayer in carrying on the trust management. (R. 90, 117.)

The relevancy of those considerations is plain. Thus in *Helvering* v. *Stuart,* 317 U. S. 154, 169, in respect of the John Stuart trusts, the Court observed that "Control of the stocks of the company of which the grantors were executives may have determined the manner of creating the trusts", and remanded that case to the Tax Court to determine whether as a matter of fact such was the situation there. And more recently, it was pointed out that "By the simple expedient of drawing up papers, single tax earnings cannot be

divided into two tax units and surtaxes cannot be thus avoided". *Commissioner* v. *Tower,* decided February 25, 1946.

The petition is silent as to the Tax Court's findings. It neither denies their relevancy nor attacks their evidentiary basis. It asserts simply that because the trustees were invested with broad powers and a majority of the corporate stock, the taxpayer was divested of control and therefore could not remain the owner of the trust income for tax purposes. But this argument overlooks the fact that the trustees in the exercise of their powers "indicated no separate discretion in the management of the Trust" (R. 90) and were dominated by the taxpayer's will, and further that the taxpayer's wife as beneficiary and trustee was acquiescent in their operations (R. 87), and the other beneficiaries were minors and not disposed to object. It is obvious that the taxpayer was as much in control as before. The case turns wholly on the sufficiency of the evidence to sustain the pertinent findings, and upon the Tax Court's assessment of the likelihood that the trustees and beneficiaries would or would not enforce the instrument according to its terms. Even if the present case were not so wholly dependent upon its factual circumstances, the process of applying the *Clifford* doctrine to specific factual situations is clearly within the province of the Tax Court. *Helvering* v. *Stuart, supra,* pp. 167, 169; *Helver-*

ing v. *Clifford, supra,* pp. 336, 338; *Dobson* v. *Commissioner,* 320 U. S. 489, 501; *Commissioner* v. *Tower, supra.*

The decision below, affirming the decision of the Tax Court, is not in conflict with the decisions of the Circuit Courts of Appeals in *Commissioner* v. *Branch,* 114 F. 2d 985 (C. C. A. 1st), and *Commissioner* v. *Betts,* 123 F. 2d 534 (C. C. A. 7th) (Pet. 6), where on somewhat different facts the decisions of the Tax Court against taxing the trust grantor were affirmed. In *Cushman* v. *Commissioner,* 153 F. 2d 510 (C. C. A. 2d), and *Phipps* v. *Commissioner,* 137 F. 2d 141 (C. C. A. 2d), also claimed to be in conflict (Pet. 4, 6), the court rested its decision on the ground, primarily, that powers which the grantor reserved to himself as trustee were fiduciary powers controllable by a court of equity at the instance of the beneficiaries. This consideration is hardly applicable where the actualities of the situation show that the trustees' powers have not been taken seriously by the parties to the trust either in its creation or operation. The decision in *Armstrong* v. *Commissioner,* 143 F. 2d 700 (C. C. A. 10th) (Pet. 6), like the other cases above-cited, also rests upon the particular weight given by the court to various inferences derived from the facts, as witness the same court's contrary ruling, shortly afterward, in a similar situation in *Losh* v. *Commissioner,* 145 F. 2d 456 (C. C. A. 10th).

CONCLUSION

The decision rests wholly upon its peculiar facts and is within the competence of the Tax Court. The petition presents no basis for a writ of certiorari, and should be denied.

Respectfully submitted,

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August 1946.

U. S. GOVERNMENT PRINTING OFFICE: 1946